No. 46690-2-II
(Appeal of Pierce County Superior Cause No. 13-2-07071-1)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GABRIELLE NGUYEN-ALUSKAR,
Appellant/Plaintiff,

v.

CHICAGO TITLE INSURANCE COMPANY, a successor in interest to TICOR TITLE INSURANCE COMPANY, INC.
Respondent/Defendant.

REPLY BRIEF OF APPELLANT

August 31, 2015

Gabrielle Nguyen-Aluskar
Pro-Se as Appellant/Plaintiff
1922 North Prospect St., #9
Tacoma, WA 98406
(253) 200-5900
lawstudentdiva@aol.com

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I. INTRODUCTION

Chicago Title argues that the trial court acted within its discretion when it denied appellant's Motion for Reconsideration. However, based on the entire record a reasonable trier-of-fact could not have concluded that evidence presented in appellant's Motion for Reconsideration concerning an email sent to appellant by defense counsel essentially demanding appellant drop a pending complaint with the Washington State Bar Association as a contingency to any settlement agreement, did not sufficiently warrant reconsideration.

II. REPLY TO TICOR'S COUNTER STATEMENT

A. Newly Discovered Evidence In The Form Of An Email Obtained Included In Appellant's Motion For Reconsideration Provided Ample Evidence Of Serious Misconduct On The Part of Defense Counsel

Legal Principles. A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *"Wagner Development, Inc. v. Fidelity and Deposit Company of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).M.J.F. Holdings v. Utt, 2003 Wash. App. LEXIS 1346, *8 (Wash. Ct. App. June 30, 2003).* New trial, reconsideration, and amendment of judgments Wash. CR 59

(a) ***Grounds for new trial or reconsideration.*** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application;

(9) That substantial justice has not been done.

B. Respondent's Assertion That Appellant's Settlement Contingency Requiring Appellant To Dismiss A Pending Bar Complaint Was In Actuality Her Attempt To Resolve Disputes Regarding a CR 2A Agreement Is Self-Serving Without Any Basis In Fact

Appellant filed a complaint with the Washington State Bar on February 14, 2014, claiming respondent should have disqualified herself due to her prior Partnership in the same firm which previously represented appellant in this specific case; as a conflict-of-interest. The aforementioned grievance is still pending and has not been adjudicated. Appellant learned from her former attorney, Matthew D. Hartman of an email sent by respondent on May 11, 2014, proposing a new settlement offer. In substantive part, the

email contained a contingent requirement for appellant to drop her pending State Bar complaint as part of any proposed settlement. Appellant filed a motion for reconsideration on July 25, 2014, and included the newly discovered information regarding the email from Respondent. CP 84, Exhibit C.

The respondent's attempt to leverage the dismissal of appellant's State Bar complaint against defense counsel as part of any settlement agreement is in~and~of itself sufficiently problematic, and cause enough for a reasonable jurist to determine its implications on all other aspects of the case, thus, accordingly grant appellant's motion for reconsideration. The trial court erred in ignoring this newly discovered evidence presented in Appellant's motion for consideration. Respondent's convoluted and self-serving argument in justifying her contingency that appellant drop the grievance complaint as part of any settlement agreement only serves to further amplify the trial courts error. CP 72-115.

III. ARGUMENT

A. Appellant's Motion for Reconsideration Was Timely Served

Legal Principals. Wash. CR 59 **(b)** ***Time for motion; contents of motion.*** A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

Respondent erroneously cites CR 59 (a) in their brief of July 31, 2015 as the governing section concerning *Time for motion* (Page 9, Paragraph 3). Respondent acknowledged appellant filed her Motion for Reconsideration within ten (10) days, on July 25, 2014 (Page 10. Paragraph 1), then goes on to state that appellant did not serve Respondent until July 30, 2014, more than ten (10) days after the July 18, 2014 Order. Respondent erroneously attributes a time for service as being part of CR 59(b). CR 59(b) specifies that a motion for new trial or for reconsideration shall be filed not later

than 10- days after entry of judgment. CR 59(b) makes no mention of any requirements or time period for service of process. 08/05/14RP, 3-5.

B. The Trial Court Erred In Confirming The Arbitration Order/Award

Legal Principals. "The test for determining whether an arbitration award has been procured by fraud has been compared to the test for setting aside a judgment pursuant to CR 60 (b) by reason of fraud. "*Seattle Packaging*, 94 Wn. App. at 493. As we explained in *Seattle Packaging*, *Peoples State Bank v. Hickey*, 55 Wash. App. 367, 777 P.2d 1056 (1989), is instructive in this regard. There, a decree **[36]** of foreclosure was entered by default after proper service upon and failure to appear by one Hickey, who claimed an interest in the property. In obtaining the default judgment, the bank misrepresented to the court that Hickey's lien was inferior and subordinate to that of the bank. In fact, this was not so—Hickey's lien was superior to that of the bank, but Hickey slept on her rights and failed to move to set aside the default judgment within one year. After that deadline had passed, she moved to vacate the judgment under CR 60 (b), citing the misrepresentation by the bank, without which her property rights would not have been foreclosed. The court denied relief despite Hickey's strong showing of

material misrepresentation, stating: The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense. Applying the above authorities to the facts at bar, we find vacation of the default judgment is not warranted. Although [the bank] misrepresented the status of Hickey's lien, there is no connection between the bank's misrepresentation **[37]** and Hickey's failure to respond to the complaint or employ an attorney. There is no evidence that Hickey relied on the misrepresentation or was misled by [the bank's] statements in the complaint.

The misrepresentation having nothing to do with her failure to respond to the summons and complaint, Hickey cannot meet the requirement that the misrepresentation must have operated to prevent her from fully and fairly presenting her case. *Seattle Packaging, 94 Wn. App. at 493* (alteration in original) (quoting *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989)).

C. Appellant Did Not Breach The Settlement Agreement As There Were No Provision For Attorney Fees Contained Therein

While the review of an arbitration decision by the trial court is admittedly narrow in scope, it is clear in instant case that defense

counsel's role as Partner in the law firm which previously represented appellant in this case, as well as respondent's statement that any settlement entered into on behalf of her client Chicago Title must include appellant's removal of the pending case against her with the State Bar; formed the impetus for appellant to subsequently refuse the terms of settlement. Further compounding the errors made was the arbitrator's decision to award attorney's fees to respondent where no such provision for attorney's fees existed within the settlement agreement. Respondent's actions of intertwining the State Bar complaint directed at her ethical and professional behavior with her role as defense counsel for Chicago Title can be seen in the arbitrator's decision denying respondent attorney's fees for the time she spent in responding to appellant's State Bar complaint. CP 57, Exhibit 2. It reads as follows:

> **2.** My independent review reveals that the fee request should be reduced by $762.50. From February 20-March 7, 2014, attorney White spent 3.05 hours, devoted primarily to responding to the Grievance filed with the WSBA by Ms. Nguyen. Because the Grievance is not directly connected to Ms. Nguyen's breach of the CR 2A, time spent on this task should not be included in the attorney fee reward. Accordingly, the requested fee award of $12,887.50 is reduced by $762.50.

It is of import to note that respondent did not move the trial court for fees arising from responding to appellant's Pro Se motion at the time they submitted their opposition. 02/0714RP. Appellant, as well did not move the trial court for an award of fees associated with successfully obtaining an order declaring the Settlement Agreement binding and enforceable. 04/25/14RP. At time of juncture appellant had simply requested that respondent tender payment of the $40,000.00 settlement to her counsel Matt Hartman to be held in trust. The parties have attempted to resolve these issues on their own unsuccessfully. VRP 07/18/14.

The settlement payment was due regardless of any independent claim for damages that respondent sought to bring pursuant to the terms of the Settlement Agreement. Appellant had advised respondent that she would accept immediate payment of the settlement proceeds in exchange for execution of a full and final mutual release, which did not include dropping the Bar grievance.

IV. CONCLUSION

Appellant submits that the totality of the evidence does not support the trial court's denial of her Motion for Reconsideration. All of the evidence supports a finding that newly discovered evidence involving

potential misconduct on the part of respondent's defense counsel and presented to the trial court provided sufficient grounds for reconsideration of its previous decision.

Appellant respectfully moves this Court to reverse the decision of the trial court in its entirety.

RESPECTFULLY SUBMITTED, this 31st day of August, 2015.

By: _____

Gabrielle Nguyen-Aluskar
Pro Se as Appellant/Plaintiff
1922 North Prospect Street, #9
Tacoma, WA 98406
(253) 200-5900
lawstudentdiva@aol.com

Certificate of Service

I, the above-signed, certify that on the 31st day of August, 2015, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By U.S. First Class mail, pre-paid, to:

Janis G. White, aal
Fidelity National Law Group
1200 – 6th Avenue, Suite 620
Seattle, WA 98101
Attorney for Respondent/Defendant: